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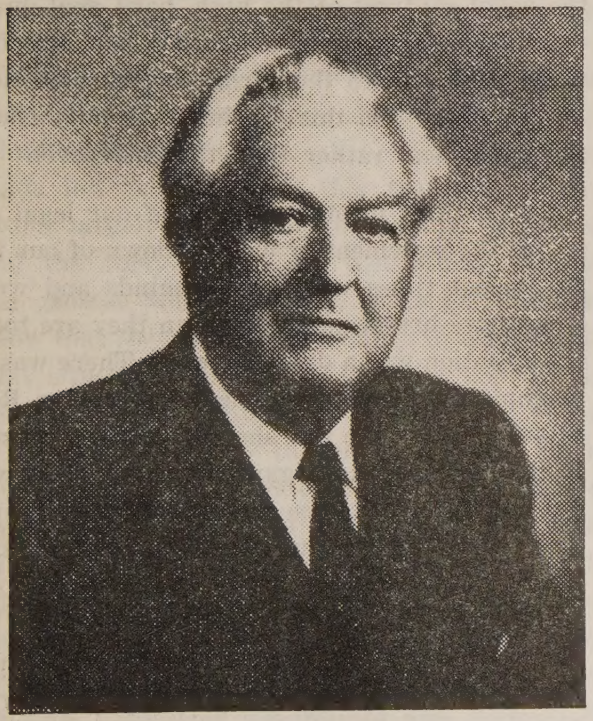
UNIFORM RULES STATUTE PROPOSED



SENATOR MCCARRAN

On January 17 Senator Pat McCarran of Nevada, Chairman of the Senate Committee on the Judiciary, introduced a bill (S. 527) to provide uniform rules of practice and procedure in federal administrative agencies. His is apparently the first such proposal in any Congress. If adopted its effect will probably be of even more tangible significance to lawyers than his bill which became the Administrative Procedure Act. The two measures would, of course, supplement each other. By this latest proposal Senator McCarran further demonstrates his continued distinguished service in the improvement of the administration of justice in the federal government.

S. 527 creates an Administrative Rules Commission to formulate general rules of practice and procedure for federal regulatory agencies. Like the previously formulated federal court rules, the uniform administrative rules would become effective if Congress does not disapprove them. Amendments are to be made in the same manner.

The Rules Commission is to consist of nine people. Four are to be members of Congress, the ranking members for the majority and minority of each of the judiciary committees. Two Senate-confirmed federal officials, a chief circuit judge, the dean of a law school, and "a practicing lawyer versed in Federal administrative law and representative of the legal profession" are to complete the group. It is to operate with the aid of advisory committees "representative of Government agencies and private or professional interests".

TOTAL JUSTICE AND ADMINISTRATIVE PROCEDURE

Under the foregoing title, Senator Pat McCarran gave his reasons for proposing uniform administrative rules legislation. The address was delivered on the evening of January 14 at the annual law dinner of the Notre Dame law school at South Bend, Indiana. In the following words, the chairman of the Committee on the Judiciary of the United States Senate explained the philosophy of his proposal as one more step toward a government under law:

For want of a better term, I should like to talk about what I call "Total Justice". It will do no harm first to recall the different meanings and methods of law and justice. Then, I think we shall have placed ourselves in a state of mind to explore a particular dark corner of the law today and to consider what may be done about it.

I.

Except for the totalitarians, we all base our law and law making upon the premise that there is a difference between right and wrong, between justice and iniquity, between goodness and sin. Occasionally there is some attempt to make it appear that law is not necessarily right, nor just, nor good. Some legal scholars have distinguished between law and morals. Other learned men have delighted in distinguishing between justice and mercy. Perhaps a man from Mars would be puzzled by these seeming contradictions. But we know that they represent shades of meaning rather than conflicts. They express our self-criticism. They mean that man-made law and man-made justice have a natural difficulty keeping up with morals, mercy, and the Christian ideal of perfection.

A more tangible difficulty lies in the several very difficult legal methods which go to make up our legal system. Of these, presumably no factor is more disillusioning than the fact that law must be applied by mere men to inexorably concrete cases. Thus we have on the one hand a plea for an ideal "government of laws and not of men" although there never was and never can be such a government; and on the other hand we have cynical surrender to thinly veiled anarchy or to the dictatorship of officialdom. Those are not so much conflicting points of view as they are the usual contrast of the high, hard goal on the one hand never fully attainable but infinitely worth while—with the dark, easy, barbaric level on the other. On this continent we have chosen the hard ideal rather than the easy level.

Still a third mooted premise of our legal system is the statement or writing down of our law. In ancient times when men's minds and words were more brutal and blunt than they are today, the situation was a dramatic one. There was for example the classic struggle in republican Rome to see whether the law should remain a mystery in the hands of the pagan priesthood or be written down for all to see and know and rely upon. The victory which gave the people of Rome their crude Twelve Tables is one of the earliest historic landmarks of government under law. Not only is there an almost perennial struggle throughout subsequent history as to how far the law should be thus written, but the difference has been refined and complicated by the further questions whether it should be written by kings, by legislators, by judges, or by less well defined state functionaries.

Let us consider whether the law should be written by legislators or by judges. An example and contrast will perhaps shed more light than

any argument of mine. In England the law is indisputably made by the legislature and, as a consequence, courts merely construe and apply the very detailed statutes, as written by Parliament, to the facts they find in particular cases. There is no significant talk of "judge made" law there. The courts do not have an overriding constitution to construe and apply, and for that reason they are not concerned with broad economic questions de novo. Indeed, lawyers do not even file briefs with the English courts; instead, after only oral argument, the judgment is almost invariably announced forthwith from the bench.

But in the United States we have a legal tradition which favors either judge-made law or administrator-made law. Yet, so far as judge-made law is concerned, this tradition is now rather largely honored in the breach. Congress and the forty-eight state legislatures produce the greater weight of law, although I do not know that they surpass the courts in word count. This situation was not always with us. In the last century the subject was fiercely debated for a period of years by the noted lawyers, David Dudley Field and James Coolidge Carter, in New York, with the nation's entire legal profession as the audience. Although Carter appeared to win most of his point in New York, Field's codes have been adopted in substantial part in nearly half the states of the Union and his idea of periodic legislative codification and revision of the law has won avowed or tacit acceptance in every jurisdiction in America. It would therefore appear fair to say that our law in the Nineteenth Century tended to be judge-made, but in the Twentieth it is primarily legislature-made. That change simply evidences, far more than any words of mine could, our gradual conversion to the theory that the law should be stated in writing by the people's representatives so far as the latter find it feasible to do so.

But we have now in this country a new phase of the law in which these old struggles in the development of our legal system are being re-enacted. In the field of administrative law we are just reaching the question as to how far the legislature should go in prescribing the rules of the game. This is not because the legislatures have been dilatory, but because administrative law is new in its significant scope and impact. It is a sign of growth and virility of our legal system that it should rebuild itself around each new legal field. Nor will such readjustment smother the budding field of administrative law. It will strengthen it by giving it recognition in our legal system and the tools to perform its task. Administrative agencies will continue to receive delegated powers. They will continue to adjudicate cases and issue what might be termed "sublegislation." But the legal framework within which they operate will be perfected by a statutory accretion slowly designed in the light of experience, reason, and the needs of modern government. This inevitable development may be achieved in major part in our time.

On the foregoing general background I venture to draw the conclusion that our people demand that our law be written, adaptable, and understandable. To the extent that it falls short of that standard, it does not represent total justice. But of course this does not mean that there is not a place for sound discretion case by case, as well as a place for precise legal rules. The cry of history and of reason is that we write and revise our laws as precisely as we may, so that they shall be as understandable as possible to the millions whose lives and fortunes they govern.

II.

This continent—and the globe itself—have been so shaken by domestic and international crises for nearly twenty years that we are apt to overlook what has been done here in our own land to improve the administration of justice. Undoubtedly it would surprise many people in other parts of the world to learn that, in addition to weathering depression and war, we had been able to make vast improvements in our legal system in the current generation. I should like to devote the second half of my remarks this evening to the achievements, and the future, of one such line of development which has already brought order out of chaos in a large segment of our federal law.

You will recall that we were hardly out of the depths of the Great Depression when, by the Rules Act of 1934, Congress provided for the formulation and operation of one set of uniform and simplified rules of civil procedure for all the federal trial courts. Not only was that effort successful, but it finally closed the breach between law and equity which had prevailed for some two hundred years. The legal profession has now been enjoying that simplified system for over a decade, and not a single voice has been raised to demand a return to the old days.

Indeed, so successful has that bitterly fought reform proved to be, that in 1938 a similar project was proposed for the field of federal criminal law. Accordingly, we now have uniformity of practice and procedure in such widely different fields as law, equity, admiralty, and criminal law. Variation and complexity have been reduced to an understandable system. A few rule books which any lawyer can obtain have replaced great sets of speculative discourses on the morass of

federal practice and procedure. Thus our law has developed in the direction of consolidating and simplifying and explaining. Not the least of our pride in this achievement should rest upon the fact that these simplified restatements of the law were formulated in the first instance by the voluntary and uncompensated labors of lawyers and scholars acting in an advisory capacity. It is perhaps not too much to venture to say that this achievement represent democracy at its best.

But I should regard myself as remiss if I were to remain content to point with just pride at what has been so splendidly done. For I know that our labors to maintain and improve justice are never finished. Moreover, there are today dark forces at work over most of the earth who preach not only against law and against order, but who insist that the appointed agents of the state are the sole and infallible masters of human destiny. For that reason I shudder to think that any responsible servant of democracy, be he Democrat or Republican or bureaucrat, would want to leave any stone unturned to prevent the development of a lawless administrative law in this country. Yet even our process of simplifying and unifying the rules of practice and procedure has stopped short of administrative agencies.

It is no answer to say that we are engaged in other more important works of post-war legal rehabilitation. The situation recalls the remark of that eloquent advocate of law reform who, reminding his hearers of the boast that Augustus had found Rome a city of brick and left it a city of marble, noted how much greater would have been Caesar's glory if he could have said that he found

> "law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two edged sword of craft

and oppression, left it the staff of honesty and the shield of innocence!"

I venture to say that the same would be true here today, even though our dwellings remain scarce and of wood instead of brick, for what good will many mansions do us if the legal fibre of the modern democratic state is to weaken and give way little by little?

Indeed, I doubt that the modern administrative state has much further to go unless it first puts its administrative house in order. Our war time experience alone demonstrates that there is a limit to the patience of our people, even in times of emergency. Unless better public relations can be achieved by our administrative agencies, there will be a lack of ability on the part of administration to meet new problems of society or to win the necessary acceptance of extended government. Consequently, in the matter of federal legal procedure alone, we are in the position of having one weak link in the precious chain which holds together the whole mechanism for the administration of federal justice.

This is not the place to go into further detail. It will suffice for the moment if I tell you that, after long study and consideration, I propose to introduce in Congress immediately upon my return to Washington, a bill "to provide general rules of practice and procedure before federal agencies". With essential differentiations, this bill is modeled after the statutes of 1934 and 1938 which implemented a similar purpose in the fields of civil and criminal procedure in federal courts. It is my hope that by enactment of the legislation which I propose we shall demonstrate that we are capable of having total justice—that our determination to unify and simplify practice and procedure can be successfully applied throughout all our instrumentalities of justice including the administrative agencies. But it will

be no simple task. It will test our best legal judgment and ingenuity. It will be a creative undertaking of high order.

Of course we shall have doubters and some opponents, as well as many who will be indifferent. They will be well-meaning folk, no doubt. But, in some part at least, they will consciously or unconsciously reflect various common attitudes against law, against Congressional legislation if it does more than appropriate money or grant powers, against the idea of simplicity or uniformity, against anything which may limit administrative authority to operate as it chooses. There will be talk that we need more justice and less law, that the project will be too difficult or too expensive, or that it will place administrative agencies in a "straight jacket". The answer to most of these arguments and fears is simply that all will depend on how well the job is done. Far more difficult undertakings have been proposed in Washington during the last fifteen years, and none have been rejected because execution would pose serious problems. Indeed, what I propose is a minor challenge compared with the problems of administration in uniform minimum wages, registrations for security issues, maximum commodity prices, limited agricultural acreage, and so on.

The objective end of all law is the rendition of justice, even to the most lowly human being. If law takes not its spirit from the fountain of all knowledge, then it, the law so-called, falls short of total justice. In no phase of the law is there more impingement with man in his every day activity than in the operation of administrative law. Here we have human effort brought before the state to have its rights assured and its wrongs redressed. Thus we are confronted with the question of the care and accuracy which must precede judgment or conclusion.

The people must be assured of the righteousness of the arbiter and the uniformity of the rule applied. So you may appreciate our anxiety to set the law of administrative procedure down so that he who runs may read and, reading, know the truth expressed by His Eminence James Cardinal Gibbons of happy memory, when he said,

> The law is not the people, the people is not the law. The law is the spirit of justice governing the people, and its application to individuals, to associations, to every form of civil life, must be so hedged round with reverence and security that the civil courts in an hour of popular passion may protect all the people from the tyranny of what might be a lawless majority.

In this hour of social and political revolution when law is loose and unstable, when individual human liberty is lightly dealt with, when property rights are precarious, when God, the source of life and law, is dared and denied, your nation at the head of the nations of the world must hold high the torch that will shed light into the dark places of legal procedure, must meet the onslaught of lawlessness by assuring to the world and to our people the rights that God intended for those who bear his image and likeness.

McCARRAN BILL FOR UNIFORM RULES

As explained by him previously in this issue of the Bulletin, Senator Pat McCarran on January 17 introduced legislation "to provide general rules of practice and procedure before Federal agencies". It has been referred to the Committee on the Judiciary of which Senator McCarran is chairman. It thus becomes S. 527 of the 81st Congress. Interested lawyers or organizations of lawyers should write their senators for copies and request to be kept advised of further legislative documents on the subject. The McCarran Bill, which follows the similar legislation which preceded the adoption of the civil and criminal rules for the federal trial courts, reads as follows:

SEC. 1. DEFINITIONS.—The definitions in the Administrative Procedure Act shall be applicable to the same terms used in this Act.

SEC. 2. RULES OF PRACTICE AND PROCEDURE FOR AGENCIES.—The Commission established by section 3 of this Act shall formulate, and transmit to the Attorney General for report to Congress, general rules of practice and procedure for agencies, including forms and such rules as it may deem appropriate in agencies respecting judicial proceedings for the enforcement or review of agency action. Such rules shall neither abridge, enlarge, nor modify substantive powers or limitations respecting any agency nor may they provide or withdraw authority to hold hearings or to issue compulsory process. Unless previously disapproved by concurrent resolution of Congress the rules so formulated shall take effect ten days after the adjournment sine die of any regular session of Congress at which, within thirty days of the beginning of such session, they shall have been reported to Congress by the Attorney General. After rules so become effective all laws and agency rules or practices in conflict therewith shall, to the extent of such conflict, be of no further force or effect except in the case of an agency proceeding initiated prior to such effective date. Additions, repeals, or amendments shall be formulated and shall become effective in the same manner. So far as any administrative function is exempt from such general rules by statutory definition or by a provision of the rules, they shall nevertheless be treated as models for adoption to the extent that the policy of this Act and the ends of justice would be served.

SEC. 3. ADMINISTRATIVE RULES COMMISSION.—For the purposes of section 2 of this Act there is hereby established a commission composed of (1) the chairmen and ranking minority members of the Committees on the Judiciary of the Senate and of the House of Representatives or, in case one or more of them declines to serve, the next ranking member of the committee on the majority or minority side, as the case may be, until four shall accept; (2) one of the Assistant Attorneys General who has served as such not less than two years, designated by the Attorney General; (3) the head of an independent agency who has served more than one term of office as such, designated by the President; (4) the senior chief judge of the judicial circuits or, in case he declines to serve, the next in seniority until one agrees to serve; (5) a dean of a law school, designated by the President; and (6) a practicing lawyer versed in Federal administrative law and representative of the legal profession, designated by the President, who shall not be subject to 28 United States Code, section 283, or any similar prohibition. Members of the commission shall receive no compensation other than reimbursement for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties as members of the Commission except that members not drawing compensation from the United States for personal services shall be paid $50 per diem in lieu of subsistence. The commission shall elect a chairman and secretary from among their number and, without regard to the civil-service laws or the Classification Act, shall appoint, and fix the compensation of, such professional and clerical assistants as may be necessary for the performance of its duties. The commission shall also provide for, and collaborate with, voluntary and uncompensated advisory committees representative of government agencies and private or professional interests. The Attorney General shall be responsible for the commission's quarters, facilities, and budget. There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary for the purposes of this Act.

SENATOR WILEY ON UNIFORM RULES

Senator Alexander Wiley, then Chairman of the Senate Judiciary Committee and now its ranking minority member, in a notable address at the Seattle meeting of the Administrative Law Section on September 7 vigorously espoused the cause of uniform rules of administrative procedure. This he did in elaborating upon his four-point program for the improvement of federal administrative law (see Bulletin, Jan. 10, pages 1-2). Although his entire address was published in the American Bar Association Journal in October, his remarks on the subject of uniform administrative rules of procedure and practice are reprinted here in order that this Bulletin may serve as a handbook on the subject. The non-partisan nature of Senator McCarran's proposals as set forth on previous pages of this number of the Bulletin is thus demonstrated by the following words of Senator Wiley:

We come now to perhaps the most important and challenging phase of our subject; namely, the formation of uniform rules of practice for administrative agencies. This constitutes the very essence of what the American Bar has been seeking for nearly twenty years. Prior to this meeting it has not been publicly discussed, although it is quite obviously a climax to the recent efforts for improvement of the administrative law system. In fact, it is a climax to the effort

at rulemaking which began in 1934 when formulation was begun of the Uniform Rules of Civil Procedure for the federal trial Courts.

Uniform rules of *administrative* practice and procedure are actually more necessary than even in the judicial system. Administrative agencies have country-wide jurisdiction over 145,000,000 people. On the other hand, our federal Courts, although dealing with matters of utmost significance, have primarily a *local* jurisdiction. Just contemplate for a moment the fact that we have sixty or seventy important federal regulatory agencies and that lawyers in dealing with them confront sixty or seventy different sets of rules of administrative practice, in their efforts to practice federal administrative law. Each of these sets of rules vary. Some are detailed; some are fragmentary, even to the point of virtual non-existence.

The effects of such extreme diversity are obvious. In the first place, administrative justice becomes far more expensive than it should be otherwise—expensive in time and in manpower. To keep abreast of the diversified administrative system proves discouraging to anyone, even the most experienced administrative lawyer. In fact, this extreme diversity has deprived many people of the representation they are entitled to from the Bar in administrative cases.

Secondly, diversity causes constant *turmoil and confusion.* When you look at the situation, you see a picture of details changing here in one agency, topics being added there in another agency—whole rule books being rewritten sometimes without apparent plan. The voluminous pages of the *Federal Register* record this chaos of diversity as the stream of new regulations, amended regulations, substituted regulations pours on.

We are not striving at uniformity merely for the sake of uniformity. We do seek order out of chaos, but not at the expense of such diversity as may actually be necessary because of the peculiar nature of particular agencies. We know that there is a tremendous degree of uniformity that must reasonably and justifiably be obtained so that lawyers will know better how to proceed to secure or define the rights of their clients. When we have attained this objective of *reasonable uniformity,* we will have taken a vast step in getting the mystery, the discouragement, the frustration out of administrative law operations. What we will be doing in effect is translating the fundamentals of the Administrative Procedure Act into the operating details of the administrative process.

You and I know of the tremendous number of obstacles confronting us as we seek reasonable uniformity. We know the difficulties involved. We know the diversity of such matters. But, after all, the Courts themselves handle a diversified business; yet they find uniform rules helpful. The Bar handles a tremendous diversity of cases, yet it finds uniform rules helpful. Why, then, should not the rule of uniformity be applied insofar as possible to administrative agencies and practitioners?

* * *

Although we are seeking the improvement of administrative justice, we do *not* want to do it at the price of complicating legal affairs. On the contrary, we are seeking *simplicity,* knowing that simplicity usually constitutes the key to improvement in our entire judicial and administrative system.

Every time we are able to cut the complicated "dry rot" that accumulates in administrative law, we free that many government employees

from working under the burden of that rot. We free lawyers and their clients to do other creative work and engage in their business or legal activities toward other ends. Thus we increase in effect the *manpower potential* and the *production potential* of the nation.

Human law is a human mechanism, subject to change by human beings. As the race grows and develops, it reflects growth and development in law. Static law suggests a frozen society. Law, like every other thing human, should with judgment and vision be altered to meet changing conditions. Free men are best able to meet a changing world because they have learned to subject themselves to their own laws.

I end on this note of the great *frontier* which awaits—the legal and administrative frontier challenging us, beckoning us to set new standards of uniformity, of simplicity, of clarity, of efficiency.

CHIEF JUSTICE VANDERBILT OUTLINES UNIFORM RULES METHOD FOR AGENCIES

In his address at the Seattle meeting of the Administrative Law Section last September, Chief Justice Arthur T. Vanderbilt of New Jersey outlined for lawyers the concept and method of the proposal for formulation and adoption of uniform rules of administrative practice and procedure in federal agencies. As the first spokesman for the bar on the subject, his words carry weight because—among many other things—he was the chairman of the Advisory Committee which formulated the recently effective uniform rules of criminal procedure for the federal trial courts. He thus speaks as a practicing lawyer, a rule maker, and a jurist of great distinction. Although his remarks were published in full last October in the American Bar Association Journal, they are reprinted in part here so that this Bulletin may contain essential current material on the subject. Judge Vanderbilt's thoughtful address illuminates the problem, and the approach to it, in the following words:

Uniformity of practice and procedure in the area of our federal administrative law, it seems to me, is a natural and logical development. It may be viewed either as one more step in the making of uniform rules begun in 1934 or as the final step in the phase of legal consolidation begun by the adoption of the Administrative Procedure Act. Perhaps it is a bit of both. Certainly it has its roots and analogies deep in our legal system, and obviously it would culminate the reforms advocated in the studies I have mentioned and legalized by the act of 1946.

Since utility is the keynote of today's legal philosophies, I presume we should first consider how uniform rules of federal administrative procedure will benefit either the people, their government, or the two jointly. In mentioning this phase of the matter, I shall not regard myself as required to defend law as against anarchy, rule as against discretion, or uniformity as against disparity. I take it that we may assume that simplicity is a good thing if it is feasible. Secondly, I trust we may assume that knowledge and certainty of the rules will benefit those who are regulated. Put these two things together and you have the reason why feasible simplicity of rules of administrative procedure will aid those who are regulated by conveying to them both knowledge and certainty. For when the procedures of nearly a hundred federal agencies are not only meaninglessly diverse but changing week by week, enlightened only by the feeble glow of the *Federal Register*, clients and lawyers alike can have only an imperfect knowledge and no

practical certainty of the ways of federal regulatory agencies.

To be sure, great strides have been made through the Federal Register Act and Section 3(a) of the Administrative Procedure Act. Pursuant to the latter, federal agencies have now for two years been restating their rules of practice and procedure. As anticipated, these are helpful to those who specialize. But their diversity still baffles both the general practitioner and the citizen who becomes involved, or whose business keeps him involved, in administrative processes. Moreover, unlike Court procedure, the citizen is often directly subject to continuing personal contact with administrative agencies. The administration of the revenue laws is a good example. And, while there are at most but few Courts in any judicial district, a hundred federal regulatory agencies may operate there because their jurisdiction is nationwide.

Viewing the question from the standpoint of the government and the governmental agencies themselves, I believe there are at least two paramount reasons why feasible uniformity of rules of regulatory practice and procedure would be an aid rather than a hindrance. In the first place, uniformity and simplicity are of as great aid to government officials as they are to private lawyers. As a matter of fact, since the government is a giant organization, whatever simplifies and makes understandable its operations to those who serve in that organization is something that no far-sighted administrator can afford to overlook.

And even if administrators prefer unnecessary complexity, the public has an overriding right to any efficiency obtainable through uniformity of methods, procedures, and practice. Of even more importance is the fact that feasible uniformity and simplicity will improve governmental public

relations. It is just as important for governmental programs and agencies to have good public relations as it is for a member of Congress to have the approval of a majority of his constituents. The lack of public support is as fatal to the one as to the other. The history of some of our recent war agencies is proof of this.

You will note that I have been speaking of *feasible* uniformity and simplicity. Of course there will be immediate objection on the ground that administrative operations are too diverse, too complex, and too variable for subjection to uniform rules of practice and procedure. I hardly think so. For every type of administrative process, we have many judicial counterparts in one form or another, ranging from corporate reorganizations to the administration of water rights. Furthermore, we now know, as we did not ten years ago, a great deal about how administrative operations fall into a few basic categories. That knowledge has been gained in good part through the studies, research and comparison that has been going on along many fronts.

In any event, I do not suggest that some one or more persons devise a theoretical set of rules of practice and procedure from *a priori* conceptions. Study will be necessary, but it will not be too difficult. As I have said, the federal administrative agencies have been revising their rules of practice for two years pursuant to the command of Section 3(a) of the Administrative Procedure Act. Those sets of rules may be laid side by side and compared. We may then supplement, so far as necessary, our present knowledge of the problems of particular agencies or processes. We shall thus be in a position at least comparable to that of the committees who have devised uniform rules for the numerous Courts and almost endless variety of law suits.

Moreover, it is not even necessary that we determine in advance whether there should be uniform rules or merely model rules. While I believe that uniformity will be shown to be feasible and desirable, even if it were not, we may still formulate model rules as suggestions upon which agencies may fashion their actual rules. A desirable degree of uniformity may be achieved thereby through voluntary action, if mandatory uniformity should seem impracticable. But let me say again that I do not believe that uniformity will be shown to be impracticable, or even that the issue will lie between uniform rules and model rules. If formulated and promulgated, uniform rules should probably reserve to individual agencies—just as is now reserved to each federal trial Court—authority to supplement the uniform rules. Thus the system of uniform administrative rules of procedure, as in the case of judicial rules of procedure, may be made to provide the necessary flexibility and individuality. The situation will thus be reduced to a matter of informed judgment on the part of those who frame the uniform rules.

Investigation of the feasibility of uniform rules of administrative procedure leads immediately to the differentiation of the several basic types of administrative regulatory operations. Both the studies and existing legislation recognize them. There is rule-making and there is adjudication, with licensing as a special kind of the latter. All differ according to whether or not there is a statutory requirement of an administrative hearing upon which official judgment must be based. But surely these differences can, and will, be recognized in any set of uniform rules which may be proposed. I believe, too, that such rules should cover the mechanics of judicial review to the extent that existing Court rules do not adequately deal with the subject.

"But," some critic is bound to say, "What are you going to put into your uniform rules?" There will, of course, be fears in some quarters that administrative independence or freedom of action will be impaired. Certainly independence of judgment should not be disturbed. But freedom to act meaninglessly to the increased diversity, complexity, and the confusion of practice and procedure would and should be curbed.

Yet it is a fair question to ask what will be contained in these uniform rules of administrative procedure. We can indicate their scope. They would include such matters as service of administrative process, the filing of papers, computation of time, and the form and style of documents. Just as there are rules of pleading for Court cases, there should be something similar for the less formal field of administrative justice. A standardized motion practice is badly needed. For "formal" administrative processes there should be at least the rudiments of pre-trial procedure, perhaps the subject of parties and intervention can be regularized, and certainly deposition procedure can be standardized. Procedure for the submission of evidence in written, rather than oral, form may be fostered. The vexed subject of subpoenas should be reduced to uniformity. Simple directions could be stated respecting the handling of different forms of evidence, offers of proof, and so on. Perhaps the subject of exceptions to examiners' reports may be amplified for the benefit of agencies and private parties alike. Procedures for rehearings, reopenings, and reconsideration of cases surely could be stated more meaningfully than at present. These and others like them indicate what I have in mind.

But it may be asked: "Who will make these uniform rules and by what authority will they

be promulgated?" Let me answer these questions in reverse order.

I am not going to assume or to argue that uniform rules could be made binding upon both departmental and independent agencies without a special statutory basis. Perhaps it is true that merely model rules could be studied and published upon the authority of the Chief Executive alone. But since we should seek in my judgment uniform and binding rules if possible, statutory authority should be secured. Such a course will also add greatly to the dignity of the project and its acceptance in and out of government. Of course, investigation might be started in anticipation of legislation as an exploratory move. But ultimately, I think, a simple statute will be necessary, in which care is taken to state the scope of the project and all the other things necessary to make it effective.

Lastly, it remains to be considered who should perform this task and how. Perhaps these are the most difficult questions of all. You will recall that the uniform rules of judicial procedure were drawn by committees, subject to the ultimate approval of the Supreme Court. The responsibility of the latter was fitting in those cases because it was *judicial* procedure in the federal Courts that was being reduced to a uniform and simple system. But here we propose to deal with *administrative* procedure.

In another respect, however, we can well borrow from past experience in judicial rule-making. There committees of practitioners, government representatives, and scholars had the first responsibility. They were aided by information and suggestions from voluntary committees of various professional organizations. The mixed committee idea should be a fair, if not the only, approach here. Perhaps legislative representatives should be added.

A statutory commission of that character, aided by specialized committees representing private organizations and government agencies, may be the simplest answer. As in all such things, the fairness of its composition and ability of its membership will perhaps be more important than operating details. Such a commission may make its final report to the Chief Executive, as head of the administrative branch of the federal government, as well as to the Congress. Both should have a voice in the final acceptance or modification of the proposed uniform rules, thereby further safeguarding both governmental and public interests.

I submit that simplified and unform rules of administrative procedure (1) will benefit both private interests and government agents and agencies, (2) they should be adopted only to the extent study shows them to be feasible and in any event they should permit individual agencies to supplement them in their details, (3) they must differentiate between different forms of administrative operations and contain only matter relating to procedure and practice rather than substance, and (4) they might be formulated by a statutory commission composed of representatives of both governmental agencies and duly interested private parties. The Bar should welcome it as a means of bringing administrative practice within the reach of the general practitioner. The government should welcome it as a means of fostering necessary good public relations, if nothing more. And the Courts might well welcome anything which generates more light and less heat in the field of administrative law.

ATTORNEY GENERAL'S COMMITTEE URGED STANDARDIZATION OF AGENCY PROCEDURE

Although most people familiar with the current history of federal administrative law are aware of the nature and importance of the work of the so-called Attorney General's Committee on Administrative Procedure from 1939 to 1941, few will recall that in its final report in January 1941 the Committee advocated organized effort to standardize rules of practice and procedure in federal agencies. The following excerpt demonstrates the thought of the Committee in that comparatively early day (Senate Document No. 8, 77th Congress, pages 123-126):

The Committee has been impressed in the course of its inquiries not only by the need for dissimilarities in administrative procedures, to which allusion has been made in this report, but also by the possibilities for greater uniformity in many subordinate particulars. The Committee has also been much impressed by the absence in many agencies of information or interest concerning the procedures in other parts of the Federal administrative establishment.

These circumstances, especially when joined with others about to be mentioned, strongly suggest the desirability of establishing within the Federal Government a permanent organization to devote attention to the agencies' common procedural problems. True, the vigor of procedural reform and the alteration of existing practices depend perhaps not so much on forces outside the agencies as on the agencies' own sensitivity to the need for self-criticism and improvement; nevertheless, improvements may well be stimulated by an organization especially qualified to perceive existing defects and suggest correctives.

To this end the Committee recommends that there be established by law an Office of Federal Administrative Procedure somewhat comparable in dignity and responsibility to the Administrative Office of the United States Courts. * * *

In general, it should be the major function of the Director to examine critically the procedures and practices of the agencies which may bear strengthening or standardizing, to receive suggestions and criticisms from all sources, and to collect and collate information concerning administrative practice and procedure. As the Committee has discussed in chapter II of this report, not the least of the difficulties which have confronted the orderly development and understanding of administrative procedure is the absence of detailed information and study. Recurring problems have been treated by each agency without regularized reference to other agencies; separate bodies of law have grown up and some degree of confusion has resulted. On the one hand, this has resulted in considerable loss of time and energy to each agency, which has been forced to build up its procedures and gather its own law as best it might. On the other hand, the absence of information has proved irritating to the members of the bar and the public dealing with the agencies. Knowledge and regularization of procedures should go far toward creating that confidence in the administrative process which is necessary for its successful functioning.

* * * The Committee suggests certain problems in addition to those dealt with in this report, to which attention of the Director, with advice of such committees and representatives as he might select, could usefully be turned:

Subpenas. The practices of the several agencies in respect of the issuance of subpenas upon request of private parties and upon request of

the agencies' own employees, show wide differences. Some of them are readily understandable in the light of the special uses to which subpenas may be put by those to whom they have been made available. Other differences are no doubt largely accidental and reflect nothing more profound than the haphazard growth of administrative processes. The Committee doubts the justifiability of a requirement that applications be made in a way that is burdensome to respondents nor does the Committee perceive justification for issuing subpenas for the use of an agency's officers without first requiring a showing that they are needed and will be properly used. To the extent that they will not be governed by the proposals already made by this Committee in connection with adjudicatory proceedings, these are all matters which can readily be regularized by the agencies themselves and which should be evaluated * * * with a view to conforming and strengthening present practices.

Depositions. The formalities involved in the taking of depositions vary somewhat in different agencies, though the common provision is that they may be taken in accordance with the law of the state in which the particular case is pending. No one of the procedures employed by the several agencies in this particular has seemed to the Committee to be unfair or unwieldy. It may be, however, that in this respect a higher degree of uniformity than now exists is attainable and would be desirable. That possibility is commended to * * * study * * * along with the possibility that specific provision should be made for the taking of depositions where it is now lacking.

Briefs and pleadings. A variety of requirements now marks the agencies' choices concerning the desirable form and style of briefs, appli-

cations, and pleadings. While the contents of these papers must necessarily remain unstandardized, there appears on the surface to be no reason why printing specifications, size and quality of paper, and like matters should not be uniform by agreement among the agencies. The needs of legibility are not likely to be affected by circumstances peculiar to any one of the administrative bodies.

Answers. The officers of agency after agency have expressed to the Committee the opinion that the answer is not a useful pleading in administrative procedure. Answers which contain only general denials do no more than give advice that a contest may be expected. They do not serve to narrow the issues of that contest. Consideration should be given * * * to the present provisions of statutes and regulations concerning answers, with a view to determining whether they should be drastically altered, perhaps by substituting for the answer a mere notice of desire to be heard. Failure to file such a notice within a stated period might constitute a default obviating the necessity of scheduling unwanted hearings.

Hearing records. The sheer costliness of securing a stenographic transcript of a record compiled in an administrative proceeding is shocking. A careful survey should be made in order to determine whether cooperation among the agencies might not secure a lowering in the expense. While in many agencies the cost of transcripts is less than for corresponding records of most court proceedings, there is no uniformity in this respect, and the charges are in almost every instance more than is seemly when cheapness is one of the asserted virtues of the administrative process. It is possible that a grouping of the reporting services for which the

agencies now contract might lower costs. In any event, continued inattention to this detail of the conduct of proceedings is not justifiable.

Reports to agencies. The Committee has noted * * * that it is often necessary for agencies, in preparing regulations and in the course of other duties, to require individual citizens and corporations to make extensive reports. These may be in the form of periodic reports of answers to questionnaires or the like. The information so gathered is usually necessary for informed regulation and, indeed, may be the very means whereby an agency aquires expertness. Yet returns and reports to administrative agencies should be held within the limits of what is actually necessary. It is unquestionable that one of the factors proving most irritating as well as expensive to the public is the duty of collecting and submitting extensive information. Sometimes there is considerable duplication among the agencies. The Committee accordingly recommends * * * the study of this problem [as] already initiated by the Division of Statistical Standards, Bureau of the Budget, with a view toward limiting requests for information and toward harmonizing the activities of the agencies so as to avoid harassment of individuals. Consideration might well be given to the creation of a central bureau for the collection of necessary data.

AITCHISON ON UNIFORM RULES

Commissioner Clyde B. Aitchison of the Interstate Commerce Commission, dean of the top level administrative corps in Washington, has long advocated uniformity of rules of practice and procedure in federal agencies in speech and in writings both official and unofficial. His reasons are stated in the following excerpt from his article on Reforming the Administrative Process *at 7 Geo. Wash. L. Rev. 703, 716-717 (1939):*

Notwithstanding the need for caution in endeavors to reform, differences in federal administrative procedure which have no justification save the accident of their historical development, are needlessly disconcerting, and should be avoidable. The whole system of Federal administrative law would be strengthened if it were more homogeneous. * * *

The pity is that many differences in procedure are needless and purposeless, and that achievement of a higher degree of unity and coordination is feasible. The existence of such variances in practice is seized upon as a talking point by those who would destroy the effectiveness of the administrative process. Procedural variances which are not required by the nature of the particular functions tend to defeat the basic purposes of the resort to the administrative agency—simplicity, speed, and disregard of formalities, the better to get the substance. They menace the whole administrative system, because a single bad situation, peculiar to a particular institution, may bring into the law some legislative or judicial corrective of a general character, which, while correcting the one situation will create infinite mischief if applied universally.

Much progress is being made in securing desirable unification in practice and psychological approach. The courts, in the usual course of judicial review, have aided by clarification and definition. Recent overhauling and simplification of the Federal judicial practice will materially influence the administrative process. * * *

The trouble with many of the proposals for administrative reform is that they approach the problem from the wrong end—they aim to fa-

cilitate correction of administrative action *after* the error has been committed, rather than to make correctness of administrative action more sure and universal.

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